In the Supreme Court of the United States.

OCTOBER TERM, 1908.

OCEANIC STEAM NAVIGATION COMPANY Limited, plaintiff in error, *v.* NEVADA N. STRANAHAN	No. 509.
INTERNATIONAL MERCANTILE MARINE Company, plaintiff in error, *v.* NEVADA N. STRANAHAN	No. 510.
INTERNATIONAL MERCANTILE MARINE Company, plaintiff in error, *v.* NEVADA N. STRANAHAN	No. 511.

BRIEF FOR THE UNITED STATES.

STATEMENT.

These three cases involve questions arising under the laws and Constitution of the United States and come directly to this court on writs of error directed to the Circuit Court of the United States for the Southern District of New York.

The actions were brought to recover the amount of certain fines imposed and collected under section 9 of the immigration act of March 3, 1903.

Section 9 is as follows:

> That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease; and if it shall appear to the satisfaction of the Secretary of the Treasury (Secretary of Commerce and Labor) that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted. (32 Stat. 1213, 1215.)

The three actions comprise five counts, which will hereafter be referred to as the counts "Before Circular 58" and the counts "After Circular 58." The two counts in action No. 509 and the first count in No. 510 belong to the class of fines collected before Circular 58. The second count in No. 510 and the single count in No. 511 belong to the class of fines after Circular 58.

Before Circular 58.

In these cases the procedure which resulted in the Secretary of Commerce and Labor arriving at the conclusion that the fine should be imposed, and the manner of its imposition and collection were as follows:

The steamship companies have landing agents at Ellis Island who look after the immigrants.

As the immigrants come up the stairway in the entrance of the immigration building at Ellis Island, they are examined by two medical officers of the Marine Hospital Service. Those that pass the examination go on, while those that fail are taken back into the medical examination room for further examination. If it is found there that medical treatment is necessary, papers are made out and the alien is sent to the Government's hospital at Ellis Island. As soon as this is done, a notification is sent to the steamship company that the alien has been sent to the hospital, the notification stating the name of the alien and of the steamer, the date of arrival, and the nature of the disease. This notice is sent the day the steamer arrives.

> Testimony of William F. McDowell, in charge of the medical division of the Immigration Service at Ellis Island. Record No. 509, pp. 45–47; No. 510, pp. 58–59; No. 511, pp. 43–45.

The representatives of the steamship lines call at the medical division of the Immigration Service at

Ellis Island very often with respect to these notifications. The hospital reports relating to the aliens are accessible to them. This has been the practice since 1893. (Rec. No. 509, p. 46, fol. 100; No. 510, p. 58; No. 511, p. 44.)

The landing agents of the companies have full access to the ship's manifest from which can be ascertained the names of all aliens who have failed to pass the medical division, and also to the daily reports of admission to the hospital. (Rec. No. 509, pp. 44, 50, 52; No. 510, pp. 56, 57, 63, 64; No. 511, pp. 43, 45, 48, 49.)

Since the enactment of section 9 in 1903 and the imposition of fines thereunder these representatives of the steamship companies at Ellis Island have been instructed to report the sending of aliens to the hospital and have been able to do so if they chose. They are instructed to report when the certificate of the medical officer shows that the alien arriving was afflicted with a dangerous contagious disease. (Rec. No. 509, pp. 41, 43; No. 510, pp. 54, 55.) The surgeon's notices above described, which are sent to the company, are frequently handed to the agents before sending. (Rec. No. 509, p. 75, fol. 157.)

From the time a case gets into the medical division until the time that the alien is deported, every facility is accorded to the landing agents of the steamship company for information regarding the case. (Rec. No. 509, p. 47, fol. 103; No. 510, p. 60, fols. 108–109; No. 511, p. 45, fol. 84.)

The steamship company always pays the hospital expenses of aliens sent to the hospital. (Rec. No. 509, pp. 41, 76; No. 510, pp. 53, 89.)

When the examining medical officer has certified that one of these aliens sent to the hospital is suffering from a contagious disease and that the same in his opinion existed at the time of embarkation and might have been detected by a competent medical examination, a copy of the certificate is transmitted by the commissioner of immigration at Ellis Island to the Commissioner-General of Immigration at Washington for action of the Secretary of Commerce and Labor, with a letter stating the facts set out in the certificate.

This was the procedure followed in these cases, the certificates showing that the aliens named were suffering from trachoma. Upon receipt of the letter and certificate the Secretary notified the commissioner of immigration that it appeared to his satisfaction that the alien was afflicted with trachoma, a dangerous contagious disease, at the time of foreign embarkation, and that the existence of such disease might have been detected at such time. Therefore, he directed that the owners of the vessel, naming them, pay to the collector the sum of $100, in conformity with section 9.

The commissioner then advised the collector that a fine had been imposed on the owners of the vessel, while the solicitor of the collector notified the master of the vessel that the Secretary of Commerce and Labor had imposed a fine of $100 on the steamship

because he was satisfied that the alien named was at the time of foreign embarkation afflicted with trachoma, a dangerous contagious disease. The master was further notified that the vessel could not clear until the fine was paid.

The time elapsing between the issuance to the companies of the surgeon's notice and the final imposition of the penalty was six days in the case of the alien Necchi (Rec. No. 509, pp. 48, 69), seven days in the case of Von Geetson (Rec. No. 509, pp. 49, 71), ten days in the case of Klaara (Rec. No. 509, p. 26), and eighteen days in the case of Faris (Rec. No. 511, p. 19).

The trial judge has found :

> On the respective days of arrival of the respective aliens mentioned in the complaint, the surgeon in charge at Ellis Island sent notices which were addressed to and received by the plaintiff and which reported that the respective aliens had been placed in the hospital with a disease of the eyes.
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> At all the times mentioned in the complaint the plaintiff had in Ellis Island its own representative whose business took him regularly there, and who inspected and had free access to the records of the hospital to which the said aliens were removed and to the other records at Ellis Island and who could have reported to the plaintiff the sending of the respective aliens to the hospital, if they had so desired, or so been instructed by plaintiff.
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> From the surgeon's notices above mentioned and from the plaintiff's representative above

mentioned and from the previous impositions of penalties the plaintiff knew or might have ascertained that the penalties prescribed under section 9 of the act of March 3, 1903, would in all probability be imposed in respect of the said aliens.

At none of the times referred to in the complaint, and at no other time did the plaintiff ask for any hearing or offer to submit any evidence or ask for any postponement of imposition of penalty or for any extension of time for obtaining or submitting evidence. Nor did it at any time send, or ask leave to send, a physician to Ellis Island for examination of any alien, which was always permitted.

(Rec. No. 510, Defendant's Findings, pp. 17, 18; see also Rec. 509, pp. 16, 17; Rec. No. 511, pp. 13, 14.)

AFTER CIRCULAR 58.

In the second count in No. 510 and the single count in No. 511 the penalty was imposed and collected according to the regulations of Circular 58 issued in January, 1905, by the Department of Commerce and Labor, and changing in some respects the procedure. This circular is printed in full in the record.

Rec., No. 510, pp. 21–24, 36–38.
Rec., No. 511, pp. 14–16, 23–25.

After the issuance of Circular 58, pursuant to the regulations therein contained, the Commissioner of Immigration shortly after the arrival of the steamships at New York served a written notice upon the transportation company, addressed to the "Master,

agent, owner, or consignee," to the effect that a physical examination of the alien therein named indicated that a fine should be imposed under section 9 and that, if the company desired to submit evidence to show that the fine should not be imposed, it would be allowed fourteen days from the date of the notice for that purpose; that clearance of the vessel on which the alien arrived would be granted "upon condition that you deposit with the collector of customs at this port, within twenty-four hours after receipt of this, or, if said vessel shall sail sooner, prior to her sailing, the sum of $100 as security for the payment of said fine, should it be imposed." (Rec. No. 510, p. 25.)

A duplicate of this notice was sent to the collector of the port.

The circular provides that in default in payment of the special deposit required to stay action for the period of fourteen days "all further proceedings shall be discontinued and the facts certified to the Bureau of Immigration by first mail, together with the medical certificate and duplicate notice in order that such action may be taken as the evidence requires."

The circular further provides:

> *4. Stay of action.*—If, upon the expiration of twenty-four hours after service of the notice as provided in paragraph 2 of this circular, the deposit of $100 has been made in conformity with the said notice, the commissioner of immigration or inspector in charge shall suspend further proceedings until the submission of the

evidence offered to show why the said fine should not be imposed, or until the lapse of the specified period of fourteen days thereafter. When the said evidence has been submitted it shall be forwarded, together with the certificate of the examining surgeon, to the Commissioner-General of Immigration, for presentation to the Secretary of Commerce and Labor, by the said commissioner or inspector in charge, who shall at the same time present his written views as to whether the said fine should be imposed. If no evidence is submitted prior to the expiration of the said fourteen days, then said commissioner or inspector in charge shall report the case without such evidence, for action by the Secretary of Commerce and Labor.

5. Final proceedings.—Upon receipt of the decision of the Secretary of Commerce and Labor, a copy thereof shall be forwarded to the collector of customs, together with such data as may enable him to identify the special deposit made in that particular case. If the said decision imposes the fine, the $100 deposited as security shall be accounted for by the said collector in the usual manner, as a fine; if the decision holds that the penalty has not been incurred, the collector of customs shall return to the depositor the amount deposited as security.

After the issuance of Circular 58, the steamship companies did not in any way change their practice. They have never asked for a hearing on any case, or for an extension of the time given them by the cir-

cular in order to submit evidence. (Record No. 509, pp. 42, 75, 76, 79; No. 510, pp. 55, 89, 92, 93; No. 511, pp. 40, 41, 75, 78.)

The findings of the trial judge, supra, pages 6–7, apply to the counts under this head as well as to penalties imposed before the issuance of Circular 58.

The same testimony was taken for each case and it was stipulated that all of the testimony should apply to each of the actions. (Rec. No. 509, p. 34; Rec. No. 510, p. 47; Rec. No. 511, p. 33.)

At the trial the defendant conceded that all the fines were paid involuntarily and under protest. (Rec. No. 509, p. 86; Rec. No. 510, p. 99.)

I.

Congress is granted by the Constitution plenary power to regulate the bringing of aliens to our shores; and its acts within that field are valid unless they violate some explicit restriction of the Constitution.

The subject of immigration is a part of the power over foreign commerce which is expressly assigned to Congress by article 1, section 8, of the Constitution:

Nishimura Ekiu v. *U. S.*, 142 U. S., 651, 659.
Turner v. *Williams*, 194 U. S., 279, 290.
Head Money Cases, 112 U. S., 580–595.
Passenger Cases, 7 How., 283.
Commissioners v. *North G. Lloyd*, 92 U. S., 259.
Chy Lung v. *Freeman*, 92 U. S., 275.
People v. *Compagnie Générale*, 107 U. S., 59.

It is also a part of the inherent control of the sovereign over its boundary line:

Fong Yue Ting v. *U. S.*, 149 U. S., 698.
Chinese Exclusion Case, 130 U. S., 581.
Turner v. *Williams, supra.*
Nishimura Ekiu v. *U. S., supra.*

Within such fields acts of Congress are constitutional unless they fall under some specific prohibition of the Constitution.

Buttfield v. *Stranahan*, 192 U. S., 470.
Lottery Case, 188 U. S., 321, 353, 356.
Leisy v. *Hardin*, 135 U. S., 100, 108.
Fairbank v. *U. S.*, 181 U. S., 283, 285.

And, as we shall show, section 9 falls under no such prohibition.

Repeated decisions of this court have recognized the unusual completeness of this power acquired by Congress from these two sources, and have expressed the reluctance of the courts to interfere in questions arising in the administration of the laws passed by Congress in the exercise of the power.

These decisions have been influenced by two considerations: First, the political character of the right of the sovereign nation to forbid the entrance of foreigners within its dominion and across its boundary line; secondly, and corollary thereto, the fact that the importation of goods or men is a mere privilege, to be exercised, if at all, only upon such conditions as Congress may see fit to impose. These considerations have again and again been stated by this court as the foundation of its uniform refusal to consider immigration questions or questions of a similar char-

acter in regard to the importation of goods where an administrative officer has already decided the question, acting within powers expressly conferred by Congress.

In *Turner* v. *Williams* (194 U. S., 279, 289) Mr. Chief Justice Fuller said:

> Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application.
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> Whether rested on the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the act before us is not open to constitutional objection.

In *Nishimura Ekiu* v. *U. S.* (142 U. S., 651, 659) Mr. Justice Gray said:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, Lib. 2, secs. 94, 100; 1 Phillimore (3d ed.), c. 10, sec. 220.

In the *Japanese Immigrant case* (189 U. S., 86, 97) Mr. Justice Harlan said:

> The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law, and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court.

In *Buttfield* v. *Stranahan* (192 U. S., 470, 493) Mr. Justice White said:

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the

power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.

Fong Yue Ting v. *U. S.*, 149 U. S., 698.
Chinese Exclusion case, 130 U. S., 581.
Lottery case, 188 U. S., 321, 353, 356.
Auffmordt v. *Hedden*, 137 U. S., 310, 329.

II.

Section 9 does not create an offense within the meaning of the word "crime" as used in the constitutional provisions requiring a jury trial.

The following are the clauses in the Constitution in point:

Article III, section 2, subdivision 3.

> The trial of all crimes, except in cases of impeachment, shall be by jury.

Sixth amendment:

> In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.

Fifth amendment:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.

The penalty provided by section 9 is one of that long-established and well-recognized class of penalties which do not rise to the seriousness or dignity of crimes, but which may be recovered by procedure civil in form. Into such penalties the punitive

element admittedly enters, but it has more of the character of punitive damages in tort than of criminal punishment. The Constitution has not imposed limitations as to the method to be prescribed by Congress for the recovery of these penalties, the only limitations which it has imposed being in relation to crimes.

Again and again this court has laid down these principles.

In *Schick* v. *United States* (195 U. S., 65, 67) the United States prosecuted by information to collect a penalty of $50 imposed by the oleomargarine act (24 Stat., 209). The parties waived a jury trial and it was claimed that a waiver was unconstitutional in such a case. The court held the contrary, however. Mr. Justice Brewer, delivering the opinion, said:

> It will be noticed that the section characterizes the act prohibited as an offense, and subjects the party to a penalty of fifty dollars. So small a penalty for violating a revenue statute indicates only a petty offense. It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license or making a deed without affixing the proper stamp. That by other sections of this statute more serious offenses are described and more grave punishments provided does not lift this one to the dignity of a crime. * * * The truth is, the nature of the offense and the

> amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offense.
>
> In such a case there is no constitutional requirement of a jury.

In *United States* v. *Zucker* (161 U. S., 475, 481), a penalty case in which the court held that testimony could be taken by deposition and that the defendant need not be confronted by the witnesses, the court said:

> So the clause declaring that the accused, in a criminal prosecution is entitled "to be confronted with the witnesses against him" has no reference to any proceeding (although the evidence therein may disclose, of necessity, the commission of a public offense) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed. A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the Government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the sixth amendment, a witness against an "accused" in a criminal prosecution; and his evidence may be brought before the jury, in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the

> United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.

In *Callan* v. *Wilson*, 127 U. S., 540, 549, 552, Mr. Justice Harlan, referring to the third article of the Constitution, said:

> In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. * * *
>
> According to many adjudged cases, arising under constitutions which declare, generally, that the right of trial by jury shall remain inviolate, there are certain minor or petty offenses that may be proceeded against summarily, and without a jury.

Mr. Justice Harlan then proceeded to analyze, at great length, the authorities for this distinction.

In *Ex Parte Wilson*, 114 U. S., 417, 425, the same distinction had previously been pointed out.

In *Taylor et al.* v. *United States* (3 How., 197, 210), Mr. Justice Story said:

> In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was therefore strictly accurate,

> when he stated that "It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them." And he added, "It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them." The same distinction will be found recognized in the elementary writers, as, for example, in Blackstone's Commentaries (1 Black. Comm., 88), and Bacon's Abridgement (Statute I, 7, 8), and Comyns's Digest* (Parliament R., 13, R. 19, R. 20); and it is also abundantly supported by the authorities.

In *Lawton* v. *Steele*, 152 U. S., 133, 141, the court sustained the validity of a New York statute which authorized the summary destruction, without any judicial proceeding, of fish nets, which had been used in violation of the State laws. The destruction of the nets, aggregating a value of $525, partook in some degree of the character of a punitive act, for they were not a nuisance *per se*, being susceptible of lawful as well as unlawful use.

Mr. Justice Brown said:

> There is not a State in the Union which has not a constitutional provision entitling per-

> sons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury.

Incidentally it may be noticed that in *United States* v. *Ju Toy* (198 U. S., 253) the court upheld the administrative proceeding notwithstanding the insistence of the dissenting justices that the deportation there enforced was in effect a punishment.

If the statute does not create a "crime," then *a fortiori* it does not create an "infamous crime" within the meaning of the fifth amendment.

It was under this amendment that the case of *Wong Wing* v. *United States*, 163 U. S., 228, was decided, and the imprisonment there imposed by administrative proceeding was held invalid because it made the offense "an infamous crime." This case is so construed in

> *Li Sung* v. *U. S.*, 180 U. S., 486, 495.
> *Re Ah Yuk*, 53 Fed. Rep., 785.
> *U. S.* v. *Wong Dep Ken*, 57 Fed. Rep., 203, 211.
> *U. S.* v. *Hung Chang*, 134 Fed. Rep., 19–24 (C. C. A., 6th C.).

In the following cases the words "infamous crime" were defined as applying to those crimes which were

punishable by imprisonment or other infamous punishment.

Ex parte Wilson, 114 U. S., 417, 425, supra.
Callan v. *Wilson*, 127 U. S., 540, supra.
Mackin v. *U. S.*, 117 U. S., 348.
U. S. v. *Ebert*, 25 Fed. Rep. Cas., 972.

A further clause of the fifth amendment, which clearly is not concerned with this case, but consideration of which is suggested by the plaintiff's brief, is as follows:

> Nor shall [any person] be compelled in any criminal case to be a witness against himself.

It was under this clause that the *Lees case* (150 U. S., 476), relied on by the plaintiffs, and the *Boyd case* (116 U. S., 616), which it followed, were decided. Obviously these cases are wholly immaterial to the present case.

They are recognized as establishing an exception in an otherwise uniform course of judicial decisions, which refuse to treat civil penalties as involving crime. They stand rather upon the spirit than upon the letter of the amendment. The spirit of the amendment is deemed to protect persons against self-incrimination in any proceeding for forfeiture or penalty whether in form civil or criminal and whether *in personam* or *in rem*. They are a recognition of the scope of the privilege against self-incrimination which protects self-disclosures in every case involving any penal consequences. (Wigmore on Evidence, sec. 2257.)

That it was not the intent of Congress to create a crime is manifest from a consideration of the language used in section 9.

The act is not denounced as a crime or misdemeanor or even as an offense; nor is the doer of the act stated to be guilty of a crime or misdemeanor or offense. The penalty is imposed upon alternative persons, payment by any one of whom relieves the others—a course which would be absurd if a crime were involved. It is even provided that the penalty shall be paid "to the collector." The language of the court below is instructive on this point (Record, No. 509, p. 104):

> It would, I think, puzzle the astutest attorney, to draw open to conviction an indictment on this section of the act. It would be necessary to accuse a *person*, yet the "fine" is imposed on a "ship," while on conviction the court would be obliged to direct the payment of $100 *to the collector*, a method of collection hitherto unheard of on the criminal side.
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> Evidently Congress did not *intend* by this statute to add to the criminal code, and it certainly denied to any crime it inadvertently seemed to create, the only proper method of enforcement. To construe the act reasonably, therefore, the $100 "fine" must be considered a penalty, and if suable at all, recoverable in debt. (*U. S.* v. *Banister*, 70 F. R., 44.)

The section further declares:

> No vessel shall be granted clearance papers while any such fine *imposed upon it* remains unpaid.

This reference to the fine as "imposed *upon it*" (the vessel) appeared in the earlier immigration laws.

Act of March 3, 1875, section 5:

> Unless the *vessel bringing such obnoxious person or persons shall be forfeited*, in which event the proceeds of such forfeiture shall be paid over to the collector of the port of arrival, and applied by him, as far as necessary, to the return of such person or persons to his or her own country within the said period of six months. And for all violations of this act, *the vessel*, by the acts, omissions, or connivance of the owners, master, or other custodian, or the consignees of which the same are committed, shall be liable to forfeiture.

Act of February 23, 1887, section 8 (24 Stat., 414, 415):

> The expense of such return of the aforesaid persons not permitted to land shall be borne by the owners of the vessels in which they came, and *any vessel* refusing to pay such expenses *shall not thereafter be permitted to land at or clear from any port of the United States*, and such expense shall be a lien on said vessel. (See also act Aug. 3, 1882, sec. 4, and act Oct. 19, 1888, 25 Stat. L., 565.)

The fact that the section uses the word "fine" instead of the word "penalty" does not necessarily indicate an intention to create a crime, for the words "fine" and "penalty" are interchangeable.

> *Cunard Steamship Co.* v. *Stranahan*, 134 F. R., 318.

1 Bishop Crim. Law (7th ed., p. 17n) quoting a note to *Reg.* v. *Paget*, 3 Foster and F, says:

> "The mere fact of a *fine* no more shows that an indictment is a criminal proceeding than the ancient fine in trespass. Vide *Reg.* v. *Charley*, 12 E. B., 515, new trial allowed on such indictments. And see *Reg.* v. *Russell*, 3 E. and B., 942, where the dictum of Coleridge, J., is the better opinion."

The Senate committee in its report referred to the so-called "fine" as a "penalty," which of course is material upon the question of statutory construction (*The Delaware*, 161 U. S., 459, 472; *Buttfield* v. *Stranahan*, 192 U. S., 470, 495):

> Section 10 of the measure under consideration (which in the final enactment became section 9 of the law), therefore imposes a *penalty* of $100 to be *imposed* by the Secretary of the Treasury (57th Cong., 1st sess., Sen. Rept., No. 2119, p. viii; 57th Cong., 2d sess., Sen. Doc., No. 62).

There are many familiar statutory precedents for penalties to be recovered civilly as debts. For instance, section 4965 of the Revised Statutes, which provides a money penalty for infringement of a copyright. This court recently held in *Werckmeister* v. *American Tobacco Company* (207 U. S., 375) that, though the United States was entitled to one-half the penalty, it need not be a party to the proceeding. Nothing could demonstrate more clearly the civil character of these actions.

Among other penalty statutes expressly providing for recovery by civil action are the following:

Section 5 of the immigration act of March 3, 1903 (U. S. Comp. St., 1291, contract labor):

> Such alien shall forfeit and pay for every such offense the sum of $1,000, which may be sued for and recovered by the United States * * * as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien.

Revised Statutes, section 4389 (U. S. Comp. St., 2995, 2997, confining live stock more than twenty-eight hours):

> Penalty shall be recovered by a civil action.

Revised Statutes, section 5198 (U. S. Comp. St., 3493, usury), double the interest recoverable "in an action in the nature of an action of debt."

The point of view presented by these statutes has been uniformly upheld by the courts, which have laid down the rule that such penalties are recoverable civilly by an action in the form of debt founded upon tort.

In *Chaffee* v. *U. S.* (18 Wall., 516 538) the court by Mr. Justice Field:

> The action of debt lies for a statutory penalty, because the sum demanded is certain, but though in form *ex contractu*, it is founded in fact upon a tort. *U. S.* v. *The* said, *C. B. Church* (1 Woods, 275, 277).

In *Stockwell* v. *U. S.* (13 Wall., 531, 542) the court said, by Mr. Justice Strong:

> It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action. *U. S.* v. *McElroy* (115 Fed. Rep., 252).

Proctor v. *People* (24 Ill. App., 599):

> A civil action for penalty requires only a preponderance of evidence.

Ferguson v. *People* (73 Ill., 599):

> An action for penalty is an action of debt and need not be upon verified complaint.

U. S. v. *Whitcomb Co.*, 45 Fed. Rep., 89, 90.

U. S. v. *Railway Co.*, 44 Fed. Rep., 769.

Story, section 1786, distinguishing "civil prosecutions for penalties and forfeitures" from "crimes."

In *U. S.* v. *Mundell* (1 Hughes, 415, 423) the court held that provisions in regard to bail in criminal cases have no force in an action of debt for the collection of the penalty.

In *U. S.* v. *Yonger* (92 Fed. Rep., 672) the court refused a bench warrant on an information filed by the United States attorney for the collection of a statutory penalty, on the ground that the law of the State abolished imprisonment for debt.

In *Stearns* v. *U. S.* (2 Paine, 300, 311) it was held by Mr. Justice Thompson that while no jurisdiction over Federal criminal offenses can be granted to State courts, still such jurisdiction can be granted

over fines and penalties as over other civil actions. The court said:

> This was not a criminal prosecution, but a civil action to recover a penalty for a breach of statute. * * * To sustain this suit, is not administering the criminal law of the United States. Actions of penalties are civil actions, both in form and in substance, according to Blackstone. The action is founded upon that implied contract which every person enters into with the State to observe its laws. * * *

People v. *Gerard* (93 Hun, 457; aff. in 145 N. Y., 105):

> In an action of debt for the collection of a statutory penalty a verdict may be directed in favor of the plaintiff as in other civil actions.

Fielding v. *LaGrange*, 104 Iowa, 530.

(Same.)

Counselman v. *Hitchcock*, 142 U. S., 547, p. 562.

1 Bishop, 32, p. 16, secs. 956, 990.

Moller v. *U. S.*, 57 F. R., 490, 495 (C. C. A., 5th C.).

III.

In committing the enforcement of the provisions of section 9 to an administrative or executive officer, Congress did not violate the provision of the Constitution relating to the judicial power.

It is contended by each of the plaintiffs in error that the imposition of the fine was in violation of its right to have its liability established by a judicial

trial under Article III, section 1, of the Constitution, which provides:

> The judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

This position is untenable. Acts of Congress under which penalties have been imposed by administrative rather than judicial proceedings have been supported by many decisions of this court.

The mere fact that section 9 imposes a penalty does not make it any the less within the power of Congress to intrust the enforcement of the section to the administrative, rather than to the judicial, branch of the Government.

The most striking analogy to the present case is to be found in those statutes which impose additional duties as penalties for false valuations in the importation of goods. Like the penalty here involved, these penalties are incidents of the regulation of foreign commerce. They are imposed for wrongful act, in the one case in connection with the importation of goods, and in the other case in connection with the importation of men. They both partake in some degree of the nature of penalties involving forfeitures—in the one case in reference to the goods, in the other case in reference to the vessel. So far as concerns the practical reasons for administrative, rather than judicial, determination of the issues, the present case presents considerations even more controlling

than those which exist in reference to the importations of goods.

That the penal duties mentioned are strictly penalties was established by the case of *Helwig* v. *U. S.* (188 U. S., 605, 611), in which the decision turned upon that question, and the court held distinctly that the additional duties were penalties and "without doubt a *punishment* upon the importer."

In the following cases this court upheld the conclusive determination of these penalties by administrative officers:

Bartlett v. *Kane*, 16 How., 269.

In *Passavant* v. *U. S.*, 148 U. S., 214, 221, Mr. Justice Jackson said:

> As stated by Mr. Justice Campbell, speaking for the court, in *Bartlett* v. *Kane* 16 How., 263, 274, such additional duties "are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud." They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character. When the dutiable value of the merchandise is finally ascertained to be in excess of the value declared in the entry by more than ten per centum this extra duty or penalty attaches, and the collector is directed and required to levy and collect the same in addition to the ad valorem duty provided by law.

Origet v. *Hedden* (155 U. S., 228, 236).

A similar statute was sustained in *Doll* v. *Evans*, 7 Fed. Cas., No. 3969, which upheld the conclusive determination by administrative officers of a penalty of 100 per cent additional income tax for a false statement of income.

Again, in *Clay* v. *Swope*, 38 Fed. Rep., 396 (C. C. D. Ky.), an administrative determination of a penalty of 5 per cent additional duty under Revised Statutes, 3184, for failure to pay an internal-revenue tax, was sustained. The collector, after imposing the additional tax, compelled its payment by a threat of distraint upon the property. This additional duty was held to be a penalty and therefore not discharged, as were the real duties, by the subsequent exportation of the goods.

In *Commonwealth* v. *Byrne*, 20 Grat. (Va.), 165, an administrative arrest for false return of taxes was sustained.

In the very recent case of *Union Bridge Co.* v. *U. S.* (204 U. S., 364) a conviction for an offense formally made a misdemeanor by statute and involving a fine of $5,000 was upheld, although the essential facts were all foreclosed against the defendant by purely administrative determination. That case arose under an act of Congress which gave the Secretary of War authority to determine whether a bridge was an unreasonable obstruction of navigation, and if so to fix such time as in his judgment was a reasonable time for its removal or modification, and to order such removal or modification within such time, on pain of incurring the criminal

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liability imposed by the statute. This court held that the delegation to that administrative officer of the power to determine conclusively the facts was proper.

In that case, it will be seen, the administrative determination of the facts went much farther than that in the case at bar, for it conclusively determined and established all the substantial elements of what was denounced by the statute as a misdemeanor and inevitably led to a conviction of actual crime—a result which, as we have shown, is essentially different from the imposition of the civil penalties here involved. In the case of these civil penalties a judicial proceeding after a conclusive determination of the facts would be no true exercise of the judicial function, but merely the empty form of directing a verdict based solely upon the administrative determination.

Not only is section 9 of the statute supported by these decisions, but it is also supported by analogy to statutes which have long been in force and unquestioned.

Section 7 of the customs administrative act of June 10, 1890, is referred to above. That provision is the successor of Revised Statutes, section 2900, which was enacted March 3, 1865.

Revised Statutes, section 2909 was a similar provision originally enacted in 1842.

The income tax provision also is referred to above as upheld in *Doll* v. *Evans, supra.*

Revised Statutes, section 3184, which was originally enacted in 1866, provided for the imposition of the 5 per cent penalty which was considered in *Clay* v. *Swope, supra*.

Revised Statutes, section 3185, also enacted in 1866, authorized the collector to make distraint for the tax and for the penalty which he himself is authorized to add for delay in payment.

Revised Statutes, section 3962, authorizes the Postmaster-General to make deductions from the pay of contractors, for failures to perform services according to contract, and to impose fines upon them for other delinquencies.

Section 10 of the passenger act of August 2, 1882, chapter 734 (22 Stat. L., 186), provides that in case of the death of any passenger on the sea, the master of the vessel shall within twenty-four hours after the entry of the vessel pay to the collector $10 for each such passenger; and by section 12 of that act (22 Stat. L., 186) the collector is authorized to refuse clearance if the provision should not be complied with.

An English analogy strikingly close in its form to the section of the immigration law which forms the subject of these cases is to be found in 6 and 7 William IV, chapter 11, section 2 (1836, 76 Stat. L., chap. 46), which is as follows:

> *And be it further enacted*, That the master of every vessel which after the commencement of this act shall arrive in this realm from for-

eign parts shall immediately on his arrival declare in writing to the chief officer of the customs at the port of arrival whether there is, to the best of his knowledge, any alien on board his vessel, and whether any alien hath, to his knowledge, landed therefrom at any place within this realm, and shall in his said declaration specify the number of aliens (if any) on board his vessel, or who have, to his knowledge, landed therefrom, and their names, rank, occupation, and description, as far as he shall be informed thereof; and if the master of any such vessel shall refuse or neglect to make such declaration, or shall wilfully make a false declaration, he shall for every such offence forfeit the sum of twenty pounds, and the further sum of ten pounds for each alien who shall have been on board at the time of the arrival of such vessel, or who shall have to his knowledge landed therefrom within this realm, whom such master shall wilfully have refused or neglected to declare; *and in case such master shall neglect or refuse forthwith to pay such penalty it shall be lawful for any officer of the customs, and he is hereby required, to detain such vessel until the same shall be paid: Provided always,* That nothing hereinbefore contained shall extend to any mariner actually employed in the navigation of such vessel during the time that such mariner shall remain so actually employed.

In 42–43 acts of Victoria (1879), chap. 21, section 7, there is another analogy. That section provides that the master of a ship or any other person

by whose orders goods shall have been unshipped or carried under certain circumstances shall—

> forfeit *at the election of the Commissioner of Customs* a sum equal to treble the duty-paid value of such goods or the penalty of £100.

Of somewhat similar character is the statute of the State of New York which was sustained as constitutional in *Lawton* v. *Steele* (152 U. S., 133), though it provides for the summary destruction by any person of a fish net maintained in violation of law. This provision is, of course, in the nature of the abatement of a nuisance, but as the nets were not a nuisance *per se*, and were susceptible of innocent use, their destruction was in fact of a punitive character.

The essential question presented by all the cases which have dealt with the separation of powers is therefore not the question whether the instrument adopted by Congress to accomplish its object is an instrument of punishment or not, but the broader question how far the separation of the governmental powers and even the right of the individual in respect to liberty and property must yield to the paramount necessities of the public. After the innumerable decisions of this court upon this question, it can not now be doubted that the individual must yield to the public so far as the public advantage reasonably requires. It is wholly immaterial whether the surrender of $100 by the individual is or is not in some degree a punishment of that individual, provided

such surrender in such a way is reasonably necessary to the public.

That practical necessity may justify the substitution of administrative for judicial tribunals was conceded as a proposition of law by the plaintiffs in error in their brief below, and is practically conceded by them in their brief before this court. They urge, however, that this case does not involve such necessity and they plant themselves squarely upon a question of fact, viz. Is there here any "imperative necessity" for administrative rather than judicial action? Upon such a question can this court in any but the clearest case set its judgment against the judgment of Congress, confirmed by the Executive? Invariably such issues are declined by the courts, for, in the words of Marshall, they are "to be discussed in another place," and "to undertake here to inquire into the degree of [its] necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretentions to such power." (*McCulloch* v. *Maryland, supra.*)

But even if the court should enter upon this legislative ground, we believe that the facts here clearly present a case in which an administrative proceeding is the only one practicable.

Such was the view of the trial judge who said (Record No. 509, p. 105):

> Incidental to the regulation of immigrants, and absolutely necessary to efficiency of administration, is regulation of those who make

immigrants possible. The importance of such regulation can not be exaggerated, and in a city which is at once the immigrant gateway and dumping ground need not be dilated upon.

Section 9 of the act of 1903 is, in my judgment, a sanitary measure, necessary both for healthy immigrants and uninfected Americans, and as such belongs eminently to that class of summary executive proceedings, transfer of which to the judicial branch would "swamp the courts" (Sing Tuck, 194 U. S., 170) and "*defeat the object sought to be attained*" (Sing Lee, 54 F. R., 334).

Every consideration leading to the judgments in *Buttfield* v. *Stranahan* (192 U. S., 470) and *Lawton* v. *Steele* (152 U. S., 133) makes to uphold the present statute.

Clearly the objects of section 9 are of the highest political and sanitary importance. They were authoritatively stated in the report of the Senate Committee on Immigration (which is proper for the consideration of the court—*The Delaware*, 161 U. S., 459, 472; *Buttfield* v. *Stranahan*, 192 U. S., 470, 495) as follows:

> Notwithstanding the explicit prohibition of the present law, it has been found impossible to prevent the steamship companies from bringing diseased aliens to our ports. Once on this side, every argument and influence that can be used is resorted to, either to effect the landing of such aliens or their treatment in the hospital as a preliminary to such landing. Expert medical testimony is secured to attack the diagnosis of the examining surgeon and

even to question the contagious nature of the disease. Pitiable stories are told of the separation of parents from young children to induce officers to relax in the discharge of their plain duty. Great charitable organizations intervene, and even political influence is invoked for the same purpose, the steamship companies themselves, either covertly or openly, displaying a spirit of resistance to the law. If all of these obstacles to the execution of the law fail of their purpose, and the alien afflicted with tuberculosis, favus, or trachoma is sent back, still by the willful or indifferent defiance of this sanitary law the design sought by its passage is defeated, for hundreds may possibly have been—indeed, almost certainly have been—exposed to the disease in the steerage on the way over, may have been affected by it and landed before it has reached a stage of development sufficiently advanced to be detected by the medical inspector.

Section 10 of the measure under consideration [which in the final enactment became section 9 of the law] therefore imposes a penalty of $100 to be imposed by the Secretary of the Treasury for each case brought to an American port, provided in his judgment the disease might have been detected by means of medical examination at the port of embarkation. This sufficiently guards the transportation lines from an unjust and hasty imposition of the penalty, insures a careful observance of the law, and leaves in their own hands the power to escape even a risk of the fine being imposed, since they can refuse to take on board even

> the most doubtful case until certified by competent medical authority to be entirely cured. (57th Cong., 1st sess., S. Rept. No. 2119, p. viii; 57th Cong., 2d sess., S. Doc. No. 62.)

The only safe and efficient method by which Congress could provide for the determination of the questions of fact arising under this section was by administrative process.

This proposition can hardly be open to question, since for many years it has been the settled policy of the United States, again and again approved by this court, to entrust the determination of practically the same issues of fact to administrative officers.

> *U. S.* v. *Ju Toy*, 198 U. S., 253.
> *U. S.* v. *Sing Tuck*, 194 U. S., 161, p. 170.
> *Japanese Immigrant Case*, 189 U. S., 98.
> *Chinese Exclusion Case*, 130 U. S., 581.
> *Turner* v. *Williams*, 194 U. S., 279, *supra*.
> *Nishimura Ekiu* v. *U. S.*, 142 U. S., 651, *supra*.
> *Chin Bak Kan* v. *U. S.*, 186 U. S., 193.
> *Fok Yung Yo* v. *U. S.*, 185 U. S., 296.
> *Lem Moon Sing* v. *U. S.*, 158 U. S., 538.

This court has already decided that a body of administrative experts may be intrusted with the technical questions that arise in the enforcement of the immigration laws; such, for instance, as the existence of trachoma at the time of the landing of an alien. The same issues must be determined under section 9. The additional question whether trachoma existed at the time of embarkation and could then have been detected by competent medi-

cal examination is not only ascertainable by the same examination which discloses the present existence of the disease, but no other means of determination is open to the United States.

The economic waste of requiring two determinations of substantially identical issues, the sanitary dangers incident to detention of diseased aliens, the expense of such detention, the added risk of escape during prolonged detention, with its dangerous possibilities to the community, the facts that the large number of cases (over 2,000 a year, Record, No. 510, p. 69) would swamp the courts and the expenses of detention and litigation would more than eat up the amount of the recovery—all these considerations make it impossible to intrust the subject to judicial determination, and they are equally persuasive in indicating that the subject-matter is not one properly falling within the domain of the judicial power.

Nor is justice to the alien to be lightly regarded. In all right and fairness he is entitled to be returned forthwith to his home, and yet, if judicial proceedings were requisite under section 9, he would remain in confinement throughout their deliberate progress.

It can not be that the law is to estimate both the public need and the freedom to the alien as of less moment than a steamship company's privilege of judicial trial in a matter involving one hundred dollars.

These considerations of practical administrative efficiency have always been held to modify the theo-

retical separation of the powers and to justify the most serious administrative interference with liberty and property.

The contention of the plaintiffs is erroneous in that it is founded upon the assumption that the separation of the powers contemplated by the Constitution is rigid and complete, and that every situation which in its own nature, irrespective of the practical necessities of the Government, would be susceptible of judicial determination, must be entrusted by Congress to the judicial power. On the contrary it has again and again been recognized that the division of powers among the three branches is flexible, yielding to practical considerations, so that to some extent the several fields overlap.

Madison in the Federalist No. 47 (Lodge Ed., 303), examines the extent and scope of the doctrine of separation of powers, and lays down the following proposition:

> If we look into the constitutions of the several States, we find that notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

Goodnow in his recent book on Administrative Law (p. 42) states as follows the result of experience since these words of Madison:

> No political organization based on the general theory of the separation of powers has ever been established which assigns the dis-

> charge of each of the great governmental functions distinguished by this theory exclusively to one governmental authority. It is impossible for several reasons to make such an assignment of functions. * * *
>
> It will be seen from what has been said that the principle of the separation of powers as a rule of law is not by any means so rigid as it is sometimes regarded. The courts have, in developing it in its detailed applications, been guided both by historical traditions and considerations of political expediency in the desire to adapt a doctrine of French political philosophy to the needs of a system of government which had its roots in an English past.

Congress may certainly delegate to others powers which it may rightfully use itself.

U. S. v. *Eliason*, 16 Pet., 291.
Gratiot v. *U. S.*, 4 How., 80.
Nishimura Ekiu v. *U. S.*, 142 U. S., 651.
Dreyer v. *Illinois*, 187 U. S., 84.
Story on the Constitution, Sec. 528.
Baldwin on the American Judiciary, pp. 24:

> The theory of the French philosophers that all the powers of government could be divided into three parts, each bearing a name descriptive only of itself, is not supported by the practical experience of Americans. There are functions that might as well be assigned to one of these parts as another or made into a fourth and called "administrative".

The smallness of the penalty imposed by Section 9 is material in affecting the balance between the

public need on the one hand and the private interest on the other.

It is true that some public objects have been deemed of so paramount an importance as to justify summary disposition even of citizenship itself, as in the *Ju Toy case*, or of property of immense value, as $1,374,119.65 in *Murray's Lessee's case* and $400,000 in the *Union Bridge case*, or of a man's livelihood, as in the *Public Clearing House case*.

It was exclusively for Congress to estimate the public necessity, and the situation in this case would have justified it in so estimating that necessity as to impose even a serious deprivation of property. But as that course was not taken by Congress the question whether it would have been justified does not arise here.

The question which does arise is whether the court will overrule the conclusion of Congress that the public necessity is sufficient to justify an administrative disposition of property amounting to $100. Upon this question the amount involved was considered material by the Supreme Court in *Schick* v. *U. S.* (195 U. S., 65), and in *Lawton* v. *Steele* (152 U. S., 133, 140), where Mr. Justice Brown said:

> It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value as, for instance, if it were a vessel employed for smuggling or other

> illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.
>
> The value of the nets in question was but $15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense.

McGehee in his recent work on Due Process of Law, pages 375, 376, makes the following accurate observations concerning *Lawton* v. *Steele*:

> But it is to be observed that its trifling amount is dealt with, not as putting the property beyond constitutional protection, but as a consideration which the legislature might properly have in mind in providing for the enforce-

> ment of the act. The object to be attained, and the effectiveness of the means adopted (although this may depend on the value of the property confiscated) are the real considerations, and not the value of the property as a matter in itself.

State v. *French*, 71 Ohio State, 186, on the authority of *Lawton* v. *Steele*, upheld the summary destruction of fish nets by a game warden under an Ohio statute.

Within the marginal area between the powers it is competent for Congress to make such distribution as it deems reasonable for its objects and its decisions, at least within that area, are not to be disturbed by the courts.

> *Cary* v. *Curtis*, 3 How., 236.
> *Murray's Lessee* v. *Hoboken Co.*, 18 How., 284.
> *Chinese Exclusion Case*, 130 U. S., 606.
> *McCulloch* v. *Maryland*, 4 Wheat., 316, 415, 421–423.

In *Kansas* v. *Colorado* (206 U. S., 46, 88), after quoting from Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, Mr. Justice Brewer proceeded as follows:

> From this and other declarations it is clear that the Constitution is not to be construed technically and narrowly as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language,

> but as creating a system of government whose provisions are designed to make effective and operative all the government powers granted.

Obviously the administrative power is more appropriately and freely available in questions involving public rights than in questions of private right between man and man.

> *Murray's Lessee* v. *Hoboken Co.*, 18 How., 272, 283–284.
>
> Goodnow on Administrative Law, p. 384.

These are the principles by which this court has been guided in the innumerable cases in which it has upheld the delegation to the administrative department of matters of a nature theoretically capable of disposition by the judicial department. These cases have arisen in connection with nearly every subject delegated by the Constitution to Congress—from the raising of revenue to the supervision of the Indians; and not once, so far as we are aware, has the Supreme Court overruled the decision of Congress, approved by the Executive, that a public purpose could best be achieved by administrative rather than by judicial action.

ADMINISTRATIVE POWER AS TO IMMIGRATION.

The general objects to which section 9 is subsidiary have already been held to be of such public necessity as to justify the destruction without judicial proceeding of the very highest right of a citizen—namely, citizenship itself—a right beside which the alleged right of judicial trial as a

condition to the imposition of a hundred dollar penalty is insignificant.

Ju Toy v. *United States* (198 U. S., 253).

Previous to the decision in the Ju Toy case, the following cases, among others, had upheld summary administrative power over the subject of immigration.

U. S. v. *Sing Tuck*, 194 U. S., 161, 170:

> We are of opinion that the attempt to disregard and override the provision of the statutes and the rules of the department and to *swamp the courts* by a resort to them in the first instance must fail.

Chinese exclusion case (*Chae Chan Ping* v. *U. S.*), 130 U. S., 581, 609:

> Nor can their exercise (*i. e.*, the exercise of the powers of government) *be hampered when needed for the public good, by any considerations of private interest.*

Fong Yue Ting v. *U. S.*, 149 U. S., 698, 722.
Turner v. *Williams*, 194 U. S., 279.
Nishimura Ekiu v. *U. S.*, 142 U. S., 651.
Japanese Immigration Case, 189 U. S., p. 614.
Re Howard, 63 Fed. Rep., 263, 266.
Re Sing Lee, 54 Fed. Rep., 334:

ADMINISTRATIVE POWER AS TO REVENUE.

Murray's Lessee v. *Hoboken Co.*, 18 How., 272, as to deprivation of property is even more extreme than the Ju Toy case as to deprivation of liberty; for in that case the court upheld the taking of property to the extent of $1,374,119.65 by purely administrative process, and without any notice or hearing whatever.

The First Auditor audited the accounts of the collector of the port of New York, submitted them to the First Comptroller of the Treasury, by whom they were certified, and thereupon the Solicitor of the Treasury issued a distress warrant against the property of the collector for the said $1,374,119.65, both determining the liability and collecting the money without notice or hearing and by purely administrative action.

Other cases incident to the raising of revenue for the support of Government are the following, involving summary infringement of the ordinary individual rights as practically necessary to the interests of the public.

Bartlett v. *Kane*, 16 How., 263, 272:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief, and we are satisfied that such a power was never intended to be given to them. (*Decatur* v. *Paulding*, 14 Pet., 499.)

Hagar v. *Reclamation District*, 111 U. S., 708:

> The necessity of revenue for the support of the Government does not admit of the delay attendant upon the proceedings in a court of justice, and they are not required for the enforcement of taxes or assessment.

Turpin v. *Lemon*, 187 U. S., 51.

King v. *Mullins*, 171 U. S., 429.

Bells Gap R. R. Co. v. *Penn.*, 134 U. S., 232–9.

Auffmordt v. *Hedden*, 137 U. S., 310, *supra*.

Origet v. *Hedden*, 155 U. S., 228, 236, *supra*.

Hilton v. *Merritt*, 110 U. S., 87.

McMillen v. *Anderson*, 95 U. S., 37.

U. S. v. *Leng*, 18 Fed Rep., 15 (Brown, J. S. D., N. Y.).

U. S. v. *Tiffany*, Treas. Dec. No. 27754 (C. C. A. 2 C.).

Upshur Co. v. *Rich*, 135 U. S., 467.

> A county court in reviewing an assessment under a statute is not acting as a judicial body.

Cary v. *Curtis*, 3 How., 236.

North German Lloyd Co. v. *Hedden*, 43 F. R., 17 (C. C. D. N. J.).

> It must be borne in mind that this court is not called on to express any opinion on the justice or expediency of placing such unlimited power in the hands of the Commissioner of Navigation as is conferred by the act of July 5, 1884. The duty of the court is to discover whether the act is in conflict with the Constitution, and, on being satisfied that it is not, to judge accordingly. Neither is the court required to say whether the Commissioner of Navigation is or is not correct in his interpretation of the law. Congress has seen fit to constitute him the final arbiter in certain disputes, and Congress alone can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due.

Field v. *Clark* (143 U. S., 649), upholding the delegation to the President of the power of placing certain articles upon the free list.

U. S. v. *Heiuszen*, 206 U. S., 370, 389.

ADMINISTRATIVE POWER AS TO IMPORTATIONS.

The power of Congress to use exclusively administrative agencies over the importation of goods is equally well established, even when the purpose is not revenue.

In *Buttfield* v. *Stranahan* (192 U. S., 470) this court sustained the destruction by the collector of an importation of tea which was refused admission into the country because it fell below the standard which the Secretary of the Treasury had prescribed as to quality, though it was not impure or unwholesome. The importer failed to export the tea within the six months limited by the statute, and its destruction was thereupon directed by the collector, without any prior judicial process.

Mr. Justice White said:

> It is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries (p. 492).
>
> We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards.
>
> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations which is so broad in character as to limit and restrict the power

of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised (p. 493), * * *.

Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted (p. 496).

See also the opinion of Mr. Justice Harlan in *Union Bridge Co.* v. *U. S.* (204 U. S., 364).

ADMINISTRATIVE POWER AS TO BANKS.

The extent to which Congress may dispose of private interests by summary administrative process in support of the power as to national banks is illustrated by a line of cases in which the court sustained the right of the Comptroller of the Treasury to appoint receivers of national banks and levy assessments upon their stockholders without prior judicial ascertainment.

Kennedy v. *Gibson*, 8 Wall., 498.
Casey v. *Galli*, 94 U. S., 673.
U. S. v. *Knox*, 102 U. S., 422.
Bushnell v. *Leland*, 164 U. S., 684.
Young v. *Wempe*, 46 F. R., 354.

ADMINISTRATIVE POWER AS TO INDIANS.

The latest case upon this general subject is in respect to the power over the Indians.

U. S. ex rel. West v. *Hitchcock* (205 U. S., 80), dealt with the act allotting 160 acres of land to each of the Wichita Indians and delegated to the Secretary of the Treasury the final power to determine what persons were entitled under the act to such allotment. A person claiming to be a member of the tribe, but whose right had been denied by the Secretary of the Treasury, brought petition for mandamus against the Secretary to compel recognition as a member of that tribe. The Supreme Court held, Mr. Justice Holmes writing the opinion, that the Secretary's action was conclusive, although the act of Congress conferred "the absolute right upon every actual member in the band" (p. 86).

ADMINISTRATIVE POWER AS TO THE POST.

The right of the administrative officers to exclude persons from use of the mails is undoubted and was recognized in

Public Clearing House v. *Coyne* (194 U. S., 497), even to the extent of stopping payment upon a money order. The court there said:

> If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, *the result would entail practically a suspension of some of the most important functions of the Government.*

ADMINISTRATIVE POWER AS TO PATENTS.

In the subject of patents, the administrative power was sustained, and for the same reason in *U. S.* v. *Duell* (172 U. S., 576, 583):

> Congress may provide such instrumentalities in respect of securing to inventors the exclusive right to their discoveries as in its judgment will be best calculated to effect that object.

Johnson v. *Towsley*, 13 Wall., 72, 83.
Smelting Co. v. *Kemp*, 104 U. S., 636.
See also *State* v. *French*, 71 Ohio Stat., 186.

This overwhelming and uninterrupted line of authorities affirming the plenary power of Congress to adopt whatever means it shall reasonably determine to be efficacious for the accomplishment of its objects conclusively disposes of this case. Almost every one of these decisions presented more substantial interference with individual rights of liberty or of property than here involved and none of them greater public necessity for prompt and summary action.

IV.

Section 9 does not violate the due process clause of the fifth amendment.

The only particulars in which the plaintiffs in error claim that section 9 itself (as distinguished from the process adopted under it) is unconstitutional under the due process clause are, first, that it requires a determination by an administrative rather than a judicial tribunal, and, second, that it does not require trial by jury or on indictment.

Both these points are disposed of by the cases cited in Points II and III of this brief; as also by the following additional cases:

Dreyer v. *Illinois*, 187 U. S., 71, 83, 84.
Michigan Cent. R. R. Co. v. *Powers*, 201 U. S., 294.
Consolidated Railway Co. v. *Vermont*, 207 U. S., 541.
Twining v. *State of New Jersey* (decided November 9, 1908).
Walker v. *Sauvinet*, 92 U. S., 90.
Maxwell v. *Dows*, 176 U. S., 581.
Hurtado v. *California*, 110 U. S., 516.
Davis v. *Burke*, 179 U. S., 399.
Reetz v. *Michigan*, 188 U. S., 505.

V.

In the cases before Circular 58, the determination of the Secretary of Commerce and Labor that the facts warranted the imposition of a penalty was arrived at with due process of law.

It is true that prior to the issuance of the circular no formal notice of any set hearing preliminary to the imposition of the penalty was given. Nevertheless the plaintiffs had ample opportunity for defense had they cared to make one. Their theory that they were entitled to a technical and formal proceeding, failing which they needed to make no effort to avail themselves of their other opportunities for defense, is wholly untenable under the established law.

The officers of the plaintiff companies who had charge of the subject on behalf of their companies, were from the outset fully familiar with the provi-

sions of section 9. (Record, 510; Cortes, p. 52; Lederer, p. 88.) In every case that an alien was sent to the hospital with a disease likely to bring his case within the provisions of that section, the transportation company was immediately notified of the fact and of the nature of the disease. (Record, No. 509, p. 50; No. 510, pp. 53, 58, 90.) This was done on the day of arrival of the steamer. The transportation company paid the hospital expenses of aliens sent to the hospital. (Record, No. 510, pp. 53, 89.) Each of the companies had landing agents at Ellis Island, who reported the sending of the aliens to the hospital, especially in cases of "scarlet fever and such diseases." (Record, No. 510, pp. 52, 55, 88.) These landing agents had full access to the ship's manifest from which could be ascertained the names of all aliens who had failed to pass the medical division, and also to the daily reports of admission to the hospital and to the minutes of the special inquiry board which passed upon the right of the alien to land. (Record, No. 509, pp. 50, 52; No. 510, pp. 56, 57, 63, 64.)

The time elapsing between the issuance to the companies of the surgeon's notice and the final imposition of the penalty was six days in the case of the alien Necchi (No. 509, pp. 48, 69) and seven days in the case of the alien Van Geetson (No. 509, pp. 49, 71) and ten days in the case of the alien Klaara (No. 509, p. 26) and eighteen days in the case of Faris (No 511, p. 19).

Though, as we have shown, the plaintiffs had actual knowledge, at the beginning of this period, of the

likelihood that a penalty might be imposed and complete means of informing themselves as to the course of procedure in that respect, they did not, even after the practice of imposing the fines had become established, ask for any hearing or offer to submit any evidence or ask for any extension of time in order to obtain such evidence or send any physician to the island for examination of the alien, which was always permitted. (Record No. 510, pp. 55, 65, 88, 89, 92, 93.)

The insistence now upon a right to a formal set notice and a formal set hearing in view of these facts would be without any substantial merit, even if its purely technical character were not disposed of, by the fact that since the promulgation of Circular 58, which provides for such set notice and set hearing, the plaintiffs have never once availed themselves of that opportunity or offered any evidence or even asked for any extension of the fourteen days. (Record No. 510, pp. 54, 92.)

The following findings of the trial judge are instructive:

> At none of the times referred to in the complaint, and at no other time did the plaintiff ask for any hearing or offer to submit any evidence or ask for any postponement of imposition of penalty or for any extension of time for obtaining or submitting evidence. Nor did it, at any time send, or ask leave to send, a physician to Ellis Island for examination of any alien, which was always permitted.

On the respective days of arrival of the respective aliens mentioned in the complaint, the surgeon in charge at Ellis Island sent notices which were addressed to and received by the plaintiff and which reported that the respective aliens had been placed in the hospital with a disease of the eyes.

At all the times mentioned in the complaint, the plaintiff had in Ellis Island its own representative whose business took him regularly there, and who inspected and had free access to the records of the hospital to which the said aliens were removed and to the other records of Ellis Island and who could have reported to the plaintiff the sending of the respective aliens to the hospital, if they had so desired, or so been instructed by plaintiff.

From the surgeon's notices above mentioned and from the plaintiff's representative above mentioned and from the previous impositions of penalties the plaintiff knew or might have ascertained that the penalties prescribed under section 9 of the act of March 3, 1903, would in all probability be imposed in respect of the said aliens.

Defendant's findings—

Action No. 509, Nos. 5–8, pp. 16–17.
Action No. 510, pp. 17–18.
Action No. 511, pp. 13–14.

In the *Japanese Immigrant case* (189 U. S., 86, 101) the court had before it a question of due process of law arising on facts much stronger for the plaintiffs than those here existing prior to Circular 58,

and they sustained the Government thereon. The plaintiff there was an alien found within the country and sought to be deported. It was claimed on her behalf that the deportation was ordered without due process. Mr. Justice Harlan stated that due process of law implied

> not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.

In *Buttfield* v. *Stranahan* (192 U. S., 470, 497) this court intimated that a claim of the plaintiff that he had been given no hearing was disposed of by the fact that he had never asked for any hearing.

In *Auffmordt* v. *Hedden* (137 U. S., 310, 323) and in *Origet* v. *Hedden* (155 U. S., 228, 236) it was held that the question involved in the assessment of duties was not to be formally tried as if an issue in a judicial proceeding and that the due-process clause was not contravened by a refusal to allow the importer to be present and cross-examine witnesses or to examine experts so long as he had an opportunity to suggest questions to be asked of the experts and did not take it.

See also *Moy Quong Shing* (125 F. R., 641, 643).

Summary actions have been upheld when it was considered that public necessity or convenience demanded it, as, for example, in *Murray's Lessee* v.

Hoboken Land Co. (18 How., 272), in which disposition of property aggregating over $1,000,000 was held to have been constitutionally effected without any notice or hearing whatever. In that case, and similarly in *McMillen* v. *Anderson* (95 U. S., 37), the paramount importance of the public object (the obtaining of revenue) was held to override the private right, even to a hearing.

So in *Springer* v. *United States* (102 U. S., 586, 594) it was said:

> The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason.

Similar interference with the individual without any hearing whatever was involved in the cases of *Public Clearing House* v. *Coyne* (194 U. S., 407, *supra*) and the group of cases cited above and represented by *Kennedy* v. *Gibson* (8 Wall., 498, *supra*), and in the contempt case, *Ex Parte Terry* (128 U. S., 289).

In general, it may be said that any proceeding reasonably necessary and appropriate to the situation is due process of law. In *Turpin* v. *Lemon* (*supra*, 187 U. S., 51, 58) this view was adopted from the opinion of Mr. Justice Field in *Hagar* v. *Reclamation District* and applied as follows by Mr. Justice Brown:

> But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost

liberality, sometimes even to the extent of holding that no notice whatever is necessary. Due process of law was well defined by Mr. Justice Field in *Hagar* v. *Reclamation District* (111 U. S., 701) in the following words: "It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

See also

Ex Parte Wall, 107 U. S., 265, 289.
Davidson v. *New Orleans*, 96 U. S., 97, 107.

The due-process clause is not intended to require the Government to pursue proceedings of which the parties concerned never avail themselves and thereby reduce to empty formulas. The delay of fourteen days provided by Circular 58 clearly constitutes an impairment of the public interests and is to be required only where that public disadvantage is balanced by some substantial advantage to the individual.

Nor need the notice be a formal, personal notice. It is sufficient if the party concerned is made aware of the proceedings, as by publication (*Lent* v. *Tillson*, 140 U. S., 316; *Happy* v. *Mosher*, 44 N. Y., 313), or by statute fixing the sessions. *Glidden* v. *Harrington* (189 U. S., 255, 258), in which Mr. Justice Brown, in delivering the opinion of the court, said:

> These proceedings are amply sufficient to constitute due process of law. Although, with respect to this class of taxes, we have never had occasion to determine exactly what the fourteenth amendment required, we have held that the proceedings should be construed with the utmost liberality, and while a notice may be required at some stage of the proceedings such notice need not be personal, but may be given by publication or by posting notices in public places. It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law. *Davidson* v. *New Orleans*, 96 U. S., 97; *Hagar* v. *Reclamation District*, 111 U. S., 701; *Paulsen* v. *Portland*, 149 U. S., 30; *Pittsburgh, &c., Railway Co.* v. *Backus*, 154 U. S., 421; *Allen* v. *Georgia*, 166 U. S., 138; *King* v. *Portland*, 184 U. S., 61; *Simon* v. *Craft*, 182 U. S., 427; *Turpin* v. *Lemon*, 187 U. S., 51.
>
> It is further insisted that it is essential to a judicial or quasi-judicial proceeding that it should give a person accused or interested the

benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. The statute provides for semiannual meetings at specified times at the State capital, but the plaintiff in error did not appear at any of these meetings or there present an application for registration or showing of his right thereto; he simply sent to the secretary of the board a certified copy of his registration under the prior statute and his diploma from the Independent Medical College of Chicago, Ill. The latter was returned with a notice from the board that it had denied the application for registration. When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the State courts to what extent the action of the board had deprived him of his rights. (*Reetz* v. *Michigan*, 188 U. S., 509; *Kentucky Railroad Tax cases*, 115 U. S., 321.)

These plaintiffs had ample opportunity to present whatever evidence or considerations they might desire, but they never did so and never even asked for any hearing.

VI.

In the cases after Circular 58, the determination of the Secretary of Commerce and Labor that the facts warranted the imposition of a penalty was arrived at with due process of law; the regulations provided for fourteen days' notice.

The criticism made of the practice after Circular 58 is that the notice of fourteen days which it provided was too short to permit the plaintiffs to send over to Europe and prepare their evidence.

The conclusive facts that they never asked for any extension of the time or postponement of hearing, or offered to submit any evidence whatsoever, are dealt with in the next point.

The present case is not like *Roller* v. *Holly* (176 U. S., 398), where the court held invalid a judgment taken by default after five days' notice to appear, the defendant being in another State four days' journey distant. There the defendant had no opportunity to present himself before the tribunal, while these plaintiffs and these ships were in New York perfectly able to present some defense within fourteen days or within one day. It is not important that there might have been some witnesses too far off to be summoned in that time, although this might have been a consideration for an adjournment. It has never been suggested that the procedure of the Circuit Court for the Southern District of New York is unconstitutional because it provides for only fourteen days' notice of trial. A court can not adjust these matters on the basis of the most

distant witness. This was recognized in *Johnson* v. *Hunter* (127 Fed., 219, 223):

> The fact that the complainants reside in the State of Ohio can not change the rule. It would hardly be reasonable to expect legislatures, in enacting laws of this kind, to provide for a longer time to such defendants as reside a greater distance than others.

In *Hanover National Bank* v. *Moyses* (186 U. S., 181, 192) this court held that ten days' notice by mail to creditors to oppose a discharge in bankruptcy was not unreasonably short and so was not violative of the due process clause.

In *Huling* v. *Kaw Valley Ry.* (130 U. S., 559) thirty days' notice by publication was held sufficient.

In *Bellingham Bay, &c., R. Co.* v. *New Whatcom* (172 U. S., 314, 318) it was held that ten days' notice of assessment was not unreasonable.

VII.

The plaintiffs can not assert here that their opportunities for defense before the administrative tribunal did not constitute due process of law for they failed to avail themselves of the opportunities there afforded them or to ask for any further or different opportunities.

It may be that a plaintiff may wholly ignore an administrative tribunal and resort to a court for relief in a case where the administrative tribunal is without constitutional power, for such a tribunal may be deemed a nullity.

But here the administrative tribunal was constitutionally created and constitutionally invested with full jurisdiction over the subject-matter. That jurisdiction is absolutely exclusive and no more subject to review by the courts than are the courts subject to review by it.

If the Secretary of Commerce and Labor was refusing due process of law, the remedy for the plaintiffs was to proceed by mandamus to compel him to give whatever might be the requisite opportunity for hearing.

This was the decision of this court in *Hibben* v. *Smith* (191 U. S., 310, 321), in which the validity of a special assessment was attacked on the claim that there was no hearing. The court upheld the assessment. Mr. Justice Peckham said:

> If the board of trustees refuse to hear the owners of property abutting the street improvement, in regard to the subject of benefits, and arbitrarily proceed to levy the assessment solely according to the front foot, the Supreme Court of Indiana has held that such lot owner was not without remedy, and that he could by mandamus or injunction compel a hearing as to the amount of the assessment upon each lot, or prevent the approval of the engineer's report until such hearing had been accorded, and that the lot owner could not waive such a remedy and make the denial of a hearing available as a defense in an action to collect the assessment.

On this proposition the Court cited *Shank* v. *Smith* (61 N. E. Rep., 936), in which the Supreme Court of Indiana held:

> Assuming that both the committee and the board of trustees refused to grant appellants a hearing, they could not be permitted to waive their right to bring mandamus to compel a hearing, or injunction against the approval of the engineer's report until it had been accorded, and make the denial of a hearing available as a defense in an action to collect the assessment. (*Shank* v. *Smith*, 61 N. E. Rep., 936.)
>
> (See also *Reetz* v. *Michigan* (188 U. S., 505, 509) and McGehee on Due Process of Law, pp. 72, 73.)

But even before approaching the administrative tribunal with a writ of mandamus, the party should approach it with some application or some reason for a fuller opportunity for hearing. He can not properly ask a court to annul the action of that tribunal unless in the first instance he has presented his case to the administrative tribunal, so far as he could. Yet here we have plaintiffs asking the court to stigmatize the determination of a tribunal as arbitrary and unjust, though while before that tribunal they never made the slightest effort to present any defense, or to obtain further opportunities for doing so. It is not to be assumed that the Secretary of Commerce and Labor is any more disposed to act unfairly than the court itself. (*Spring*

Valley Water Works v. *Schottler*, 110 U. S., 347; *Hibben* v. *Smith*, 191 U. S., 310, 322; *Lieberman* v. *Van de Carr*, 199 U. S., 552.) Even after the promulgation of Circular 58 they still wholly ignored him. (Record, No. 510, pp. 89, 92.) As the learned court below points out in its opinion: "So far as the evidence herein discloses, Circular 58 made no difference at all to these plaintiffs. Whether information of trouble came in one way or another, plaintiffs' course was the same, i. e., to do nothing so far as denying the department's allegations was concerned." (Record No. 510, p. 116.)

These views were clearly stated by Mr. Justice Harlan in the *Japanese Immigration Case* (189 U. S., 102):

> They [the complaints as to process] could have been presented to the officer having primary control of such a case, as well as upon an appeal to the Secretary of the Treasury, who had power to order another investigation if that course was demanded by law or by the ends of justice. It is not to be assumed that either would have refused a second or fuller investigation, if a proper application and showing for one had been made by or for the appellant. Whether further investigation should have been ordered was for the officers, charged with the execution of the statutes, to determine. Their action in that regard is not subject to judicial review. Suffice it to say, it does not appear that appellant was denied an opportunity to be heard. And as no appeal

was taken to the Secretary from the decision of the Immigration Inspector, that decision was final and conclusive.

This principle was also the foundation of the decision of the Supreme Court in *United States* v. *Sing Tuck* (194 U. S., 161), where it was held that the court would not consider an application made by an alleged citizen for relief against the determination of the administrative tribunal if the remedies in that tribunal had not first been exhausted. And this even irrespective of the question whether the administrative tribunal could lawfully exclude a citizen.

The same principle appears in the suggestion of the court in *Buttfield* v. *Stranahan* (192 U. S., 470, 497), that "the plaintiff in error does not appear to have asked for a hearing."

Evidently it was the settled policy of the plaintiffs to refuse such recognition of the administrative tribunal as would be involved in presenting to it for its consideration any defense or any request for better opportunity for defense. As we have said, if the tribunal had been wholly unlawful it might not have been entitled even to that recognition, but, on the other hand, as it was a lawful tribunal, lawfully charged with the determination of the subject and with the correlative responsibility of making just determinations, it was entitled to have the plaintiffs either submit their defense to it, so far as was possible, or acquiesce in its decision.

They can not now with any justice urge in this court complaints and criticisms of the process adopted by the Secretary of Commerce and Labor when they made no such complaints or criticisms to him, and when, as was well said of the alien petitioners in

Re Moy Quong Shing (125 F. R., 641):

> They had, so far as appears, all the examination they wanted.

In *Huling* v. *Kaw Valley Ry.* (130 U. S., 559) this court pointed out that some affirmative obligation rested on a property owner to see that he was made aware of notices by publication and represented in the proceedings.

It is the *denial* of hearing that constitutes the invalidity.

In *Chin Yow* v. *United States* (208 U. S., 8, 11), Mr. Justice Holmes, delivering the opinion of the court, said:

> If the petitioner was not *denied* a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all.

So the recent decision of this court in *Prentiss* v. *Atlantic Coast Line Company* (November 30, 1908) was planted on the fact that the complainants had not exhausted their remedies before the legislative tribunals.

VIII.

It was within the authority of the Secretary to issue Circular 58.

The Government contends that the entire arrangement was for the benefit of the plaintiffs in that although the collector had a right to hold the vessel until the proceedings had been completed and the fine imposed he allowed it to go on condition that security for the payment of the fine was retained; this permission was not only well within the implied power of his department, but was expressly covered by the powers granted by the immigration law (section 22). The final imposition of the fine completed the Government's right to the money, if ever incomplete, and ratified its collection.

The promulgation of Circular 58 was directly authorized by section 22 of the law in question, in which it is provided as follows (32 Stat., 1219):

> He [the Commissioner-General of Immigration] shall *establish such rules and regulations*, prescribe such forms of bonds, reports, entries, and other papers, and shall issue from time to time, such instructions not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act, and for protecting the United States and aliens immigrating thereto from fraud and loss, and shall have authority to enter into contracts for the support and relief of such aliens as may fall into distress or need public aid; all under the direction or with the approval of the Secretary of the Treasury (Secretary of Commerce and Labor).

Such rules and regulations when so authorized by statute have themselves the force of law.

Union Bridge Co. v. *U. S.*, 204 U. S., 364, *supra.*

Origet v. *Hedden*, 155 U. S., 228, *supra.*

Auffmordt v. *Hedden*, 137 U. S., 310, 323, *supra.*

Ludloff v. *U. S.*, 108 U. S., 176.

Thacher's Distilled Spirits, 103 U. S., 679.

In *Re Kollock*, 165 U. S., 526.

Cosmos Exploration Co. v. *Gray Eagle Oil Co.*, 190 U. S., 301.

Dastervignes v. *U. S.*, 122 F. R., 30 (C. C. A.).

Stratton v. *Oceanic Steamship Co.*, 140 F. R., 829.

Even without such statutory authority the power was implied.

The requirement of a deposit as a condition for allowing clearance, pending a delay granted to the companies to give them a hearing, was an administrative measure adopted in the interests of the companies themselves. It was perfectly proper for the collector in so doing to require security for the amount of the penalty should it be imposed. This requirement of security was merely a part of the larger power expressly given by statute of requiring the final payment of the penalty.

McMillen v. *Anderson*, 95 U. S., 37, 42.

Stratton v. *Oceanic Steamship Co.*, 140 F. R., 829, *supra.*

Even if the collector had been without lawfu authority to require deposit of the money before the

final imposition of the fine, the subsequent imposition would have constituted a ratification of his act.

This point is established by the decision of the Supreme Court in *United States* v. *Heinszen* (206 U. S., 370), where this court held that though an original tax levy was without lawful authority, it nevertheless was ratified and validated by the subsequent act of Congress, and that therefore the duties could not be recovered back.

The subsequent imposition of a fine by the Secretary of Commerce and Labor, after due apportunity for a hearing had been offered, with a direction to the collector to cover the $100 exacted as a deposit into the Treasury as a fine, recognized and validated the exaction of such deposit.

IX.

Congress had the power to make the payment of the penalty a condition of obtaining clearance.

The power of Congress to limit the right of clearance can hardly be doubted.

Gibbons v. *Ogden*, 9 Wheat., 1.

U. S. v. *Brigantine William* (1808), 2 Hall's Am. Law Journal, 255; Fed. Cas. No. 614.

Hendricks v. *Gonzalez*, 67 F. R., 351.

Cunard Co. v. *Stranahan*, 134 F. R., 318.

There are many precedents in the statutes for this limiting of the right of clearance, and so far as we are aware the constitutionality of none of them has ever been questioned. From the very inception of the Government (cf. R. S. 4206, infra, originally enacted in 1797) the power over clearance has been used by

the Government as a means of collecting obligations due to it. Among such statutes are the following:

Section 10 of the immigration act of March 3, 1891.

Section 8 of the immigration act of February 23, 1887.

Revised Statutes, section 4206.

Revised Statutes, section 4205.

Revised Statutes, section 2463.

Revised Statutes, section 3987.

Section 12 of the passenger act of August 2, 1882 (22 Stat. L., 191).

Revised Statutes, section 4202.

Revised Statutes, section 5320.

In 17 Op. Atty. Gen., 82, Hon. Wayne MacVeagh, then Attorney-General, promulgated his opinion that, even though no statute directly authorized a refusal, a collector of customs could lawfully refuse clearance to a vessel whose master had failed to pay a penalty imposed under Revised Statutes, section 2809, for bringing goods into the country on a false manifest.

An English precedent is contained in Statutes 6 and 7 William IV, c. 11, sec. 2, *supra*.

It is therefore respectfully submitted that the judgment should be affirmed.

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